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No. 89-369

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

STATEMENT OF INTEREST

With the written consent of the parties, the Chamber of Commerce of the United States ("the Chamber") respectfully submits this brief *amicus curiae* in support of the Petitioner.[1] The Chamber is the nation's largest federation of business and professional organizations. Its membership includes more than 180,000 companies, partnerships and proprietorships, as well as several thousand trade and professional associations and state and local chambers of commerce. The Chamber regularly presents

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[1] Consent letters have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

the views of its members before this Court on issues of national concern to the business community. The Chamber submitted a brief *amicus curiae* in support of General Motor's *Petition for Certiorari* in this environmental case.

This case presents the Court with two important issues regarding the implementation and enforcement of the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* The first issue concerns the deadline for review by the Environmental Protection Agency ("EPA") of revisions to State Implementation Plans ("SIPs")[2] submitted pursuant to § 110 (a)(3)(A) of the Act. 42 U.S.C. § 7410(a)(3)(A). The second issue concerns the consequences of EPA's failure to meet the four-month deadline. Both issues are of great concern to the Chamber and its members, many of which are regulated under the Clean Air Act and adversely affected by the climate of regulatory uncertainty caused by EPA's protracted delay in reviewing SIP revisions.

In the case below, the U.S. Court of Appeals for the First Circuit agreed with the district court—and with every other circuit court to have ruled on the issue—that the Clean Air Act imposes a four-month deadline on EPA to approve or deny SIP revisions. The Chamber supports that ruling, but is deeply troubled by the two "remedies" proposed by the First Circuit for EPA's failure to act within the four-month period.

The Chamber does not believe that either filing a mandamus action to compel timely EPA review or requesting the trial court to reduce the amount of penalties for prejudicial delay adequately protects companies

[2] As part of the states' primary responsibility to assure air quality, the Clean Air Act requires each state to establish its own plan for implementing, maintaining and enforcing national air quality standards. 42 U.S.C. § 7410(a)(1). After formal adoption, the state must submit the plan to EPA, which is required to approve or disapprove it within four months. 42 U.S.C. § 7410(a)(2).

from the regulatory limbo EPA creates every time it fails to act on a SIP revision. Nor do these "remedies" adequately address what the Chamber perceives as the *real* reason behind the delay: EPA's fundamental dissatisfaction with the secondary role Congress has assigned it in reviewing SIP revisions.

General Motor's experience in this case is not the first instance of an EPA attempt to usurp the primary responsibility of the states to make source emission selections under the Clean Air Act. Other Chamber members have had similar experiences as "innocent bystanders" in regulatory disputes between EPA and the state charged by statute to assure the attainment of air quality goals.[3] A classic example is the company's experience in *United States* v. *Alcan Foil Products, Division of Alcan Aluminum Corporation*, No. 88-6300, (6th Cir. Nov. 21, 1989), a case involving Kentucky's attempt to obtain EPA approval of three proposed SIP revisions. To provide this Court with information not brought to its attention by the parties, the Chamber's brief will illustrate—by means of the Alcan experience—how the remedies proposed by the First Circuit in the case below fail to protect companies from EPA's recurring efforts to deprive the states of their rightful role under the Clean Air Act.

STATEMENT

A. The General Motors Case

The General Motors case arises out of an attempt by the Commonwealth of Massachusetts to revise the Clean Air Act compliance dates contained in its state implementation plan ("SIP") for meeting certain air emission

[3] *See, e.g., United States of America* v. *General Dynamics Corporation*, No. CA4 87 31K (N.D. Tex. filed July 28, 1987), involving a dispute between EPA and the state over an interpretation of certain environmental standards contained in Texas' SIP. In this enforcement action, EPA sued General Dynamics for noncompliance with the SIP, despite assurances of full compliance from the state.

limits for volatile organic compounds ("VOCs"). The original SIP contained a compliance date of December 31, 1985.

In October 1981, however, the Environmental Protection Agency ("EPA") issued a policy statement supporting SIP revisions to extend certain compliance dates for automobile paint shop operations. 46 Fed. Reg. 51386 (1981). The purpose of the policy was to lighten the regulatory burden on the automobile industry by encouraging the use of more cost-effective ways to reduce VOC emissions. *Id.*

Under a revised SIP, General Motors would be able to continue operating the existing paint shop of its Framingham, Massachusetts automobile assembly plant while it constructed a new paint facility. At a cost of $200 million, the new facility would use advanced technology to achieve lower VOC emissions, as well as lower VOC-content paint.

Consistent with the EPA policy statement, Massachusetts extended General Motor's compliance date to August 31, 1987, and submitted the proposed SIP revision for EPA review on December 30, 1985. On July 7, 1987, more than a month ahead of schedule, General Motors permanently shut down the old paint shop.

Instead of promptly reviewing the SIP revision, EPA filed an enforcement action against General Motors in district court for noncompliance with the original SIP. At the time the complaint was filed, the paint shop had been closed for a month. The SIP revision, on the other hand, had been pending for nearly two years. Yet EPA did not choose to act on it for more than a year afterwards, finally rejecting it the same day it filed its brief in the First Circuit.

1. *The District Court Decision*

The district court rejected EPA's argument that the four-month rule contained in § 110(a)(2) of the Clean

Air Act does not apply to SIP revisions,[4] and granted General Motor's motion for summary judgment. *United States* v. *General Motors Corp.*, No. 87-2068-MC (D. Mass. May 16, 1988), *see* Supp. App. at SA-4. For authority, the district court cited the rule in *American Cyanamid Co.* v. *EPA*, 810 F.2d 493 (5th Cir. 1987), which invalidated a nearly identical enforcement action because of EPA failure to act on a SIP revision within four months.[5]

In *American Cyanamid*, the Fifth Circuit prohibited EPA from enforcing the original SIP until it rejected the proposed revision. *Id.* at 501. The Fifth Circuit held that "EPA may not collect a penalty for the period between (1) four months after a state submits a proposed revision and (2) the date the EPA finally rejects that revision." *Id.* at 500. As a "critical element"[6] of its decision to bar enforcement pending final action, the *Cyanamid* court focused on the state's interest in prompt EPA review of a SIP revision "which clearly authorizes local businesses to act in accordance with it without running afoul of the Clean Air Act." *Id.* at 500. The Fifth

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[4] Section 110(a)(2) requires EPA to approve or deny state implementation plans within four months of submission. 42 U.S.C. § 7410(a)(2). EPA argued that the four-month rule applied only to its review of initial SIP submissions.

[5] The district court also cited the lower court opinion in the *Alcan* case which, at the time, was the most recent decision on the consequences of EPA failure to review SIP revisions within the four-month period. *United States* v. *Alcan Foil Products, Division of Alcan Aluminum Corp.*, 694 F. Supp. 1280 (W.D. Kentucky 1988). The Sixth Circuit reversed this decision in part on November 21, 1989. *United States* v. *Alcan Foil Products Division of Alcan Aluminum*, No. 88-6300, slip op. As noted below, the appeals court upheld the application of the four-month rule to SIP revisions, but refused to bar enforcement pending final action. The Sixth Circuit also refused to endorse mandamus actions as an effective remedy for EPA delay. *See infra* text accompanying notes 29-30.

[6] *Id.* at 499.

Circuit believed that without the protection of an enforcement bar, "American Cyanamid and similarly situated individuals and companies [would be exposed] to the unacceptable risk that, contrary to state policy decisions authorized under the Act, they will be fined because of delays within EPA." *Id.* at 501.

The district court below was equally disturbed by the "unjustifiable state of limbo" [7] unlimited EPA review creates for both the states that propose SIP revisions and the companies that comply with them.

> For an indefinite period, the state would be unable to act to balance dictated national priorities with the interests of its citizens and industries as the Clean Air Act intended. And the industries themselves, though fully in compliance with state law, would face the Scylla and Charybdis choice between ceasing operations now, or possibly being forced out of business by heavy fines later.

General Motors, SA-4. According to the district court, Congress did not intend to "put all the cards in federal hands." *Id.* at SA-5.

2. *The First Circuit Decision*

The U.S. Court of Appeals for the First Circuit upheld the four-month deadline for EPA review of SIP revisions, but rejected the *American Cyanamid* rule as "too drastic" a remedy for EPA delay. *United States* v. *General Motors Corp.*, 876 F.2d 1060 (1st Cir. 1988); App. at 14a. The First Circuit expressed concern that prohibiting enforcement pending EPA action on a SIP revision would hurt only the public. *Id.*

The First Circuit also rejected the deferred penalty approach in *Dusquense Light Co.* v. *EPA*, 698 F.2d 456

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[7] *General Motors* at SA-6.

(D.C. Cir. 1983), as encouraging denials and providing too little incentive for timely action.[8]

In an effort to forge a middle ground, the First Circuit suggested a two-part remedy for EPA delay. First, a company adversely affected by EPA's failure to meet the four month deadline could sue EPA in district court under § 304(a)(2) of the Act to compel agency action any time after the four-month review period has expired.[9] Under this approach, the district court would then "evaluate the circumstances of each case, with the failure to observe the four-month deadline being one factor to consider—a rough guidepost." App. at 15a.

Secondly, the First Circuit suggested that companies could apply for relief under § 113(b) of the Act, which requires trial courts in enforcement actions to calculate penalties by "tak[ing] into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation." 42 U.S.C. § 7413(b). According to the First Circuit, this provision authorizes trial courts to reduce penalties according to the "reasonableness of the Agency's delay and the prejudice, if any, suffered by the company as a result" [10] of enforcing an old SIP while a SIP revision is still pending. A variation of this remedy was endorsed by the Sixth Circuit in *Alcan*.

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[8] *Dusquense* allows EPA to enforce an old SIP pending review of a SIP revision, but holds penalties in abeyance until final action. The amount of penalties increase the longer EPA takes to deny a revision, since penalties are calculated back to the four-month deadline upon denial but no penalties are assessed if approved.

[9] 42 U.S.C. § 7604(a)(2). Under this section "any person may commence a civil action . . . against the Administrator [for] failure . . . to perform any act or duty under this chapter which is not discretionary . . . ."

[10] App. at 15a.

B. The Alcan Case

The Alcan case involves Kentucky's attempt to obtain EPA review of three SIP revisions submitted over the course of nearly a decade. These revisions critically affect the operation of Alcan's laminating facility in Louisville, Kentucky, an independent economic unit of the company's Foil Products Division.

Kentucky submitted the first SIP revision (SIP I) to EPA on behalf of the local air pollution control authority—the Air Pollution Control District of Jefferson County ("Jefferson County")—on July 19, 1982. This revision authorized Jefferson County to issue permits for "emission trading" pursuant to the so-called "bubble" concept of air pollution control.[11] At the time of submission, the laminating facility was owned by the Atlantic Richfield Company ("ARCO").

On January 19, 1985, ARCO sold the marginally profitable facility to Alcan, which planned on operating it under the state-authorized bubble. Brief for Defendant at 3, *United States* v. *Alcan Foil Products, Division of Alcan Aluminum Corp.*, No. 88-6300 (6th Cir. Nov. 21, 1989). Shortly after acquiring the facility, however, Alcan discovered that the SIP I revision was the subject of an ongoing dispute between EPA and Jefferson County.[12]

[11] The "bubble" concept controls air emissions on a facility-wide basis. Specifically, it treats all the pollution-emitting devices in the facility as if encased in a bubble. Thus, a company can "offset" noncompliance at one source of pollution in the facility with "emission credits" earned from supercompliance at another source. "Bubbling" has been viewed by many commentators as a "superior long-term strategy for reducing overall emissions." *See, e.g., Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 n.37 (1984); *General Motors Corp.* v. *EPA*, 871 F.2d 495, 500 (5th Cir. 1989).

[12] This dispute ultimately resulted in a lawsuit filed by Jefferson County against EPA to compel agency action on the SIP I revision. *See Air Pollution Control District of Jefferson County, Kentucky* v. *EPA*, No. C-86-0519-L-B (W.D. Ky. 1986). This case has been pending for four years.

As a result of this dispute, EPA had never ruled on Kentucky's proposed revision. Moreover, since the original SIP did not permit use of the bubble concept, EPA had taken the position that both ARCO and Alcan had violated the Clean Air Act, even though each company had operated the plant in full compliance with the SIP I revision.

To avoid becoming an "innocent bystander" of the controversy between EPA and the local air pollution control authority, Alcan requested a source-specific revision (SIP II) to allow the laminating plant to continue operating under the bubble. Without a bubble, the plant would be totally uneconomic and Alcan would have to shut it down.[13] Kentucky submitted the SIP II revision to EPA for review on March 3, 1986.

On July 14, 1986, EPA issued Alcan a notice of noncompliance with the original SIP,[14] despite the fact that the SIP II revision had been pending for more than four months. Rather than approve the SIP II revision as being consistent with applicable law at the time, EPA delayed an additional five months (until December 4, 1986) to revise the procedures and criteria for approving bubble plans.[15] On February 18, 1987, EPA staff informally notified Alcan that the SIP II revision failed to meet the new emission trading policy, and would need to be revised. No formal action was taken to deny the revision at that time.

Instead, on July 15, 1987, EPA filed an enforcement action against Alcan in district court for noncompliance

[13] It would have cost Alcan three times the net profits earned in 1989 to upgrade the laminating facility to meet point-source compliance. Moreover, it would have cost an additional 25% of Alcan's 1989 net profits to operate the upgraded facility each year.

[14] The notice, issued under § 113(a)(1) of the Act, 42 U.S.C. § 7413(a)(1), is a jurisdictional prerequisite to filing a federal enforcement action. If the violation continues beyond 30 days, EPA can either issue a compliance order or file a civil action.

[15] *See infra* note 24.

with the original SIP. EPA finally denied the SIP II revision on March 16, 1989,[16] more than three years after submission. EPA has yet to act on the revision to SIP I, with which Alcan has complied in full ever since it took over the laminating plant in 1985. A request for a third SIP revision (SIP III) is now pending before Jefferson County, as part of Alcan's latest effort to obtain final action on the bubble proposal which has been lingering before EPA for nearly a decade.

1. *The District Court Decision*

Invoking the *American Cyanamid* rule, the district court granted Alcan's motion for summary judgment. *United States* v. *Alcan Foil Products, Division of Alcan Aluminum Corp.*, 694 F. Supp. 1280, 1283 (W.D. Ky. 1988). In so doing, it upheld the four-month rule and prohibited EPA from enforcing the original SIP until it acted on the SIP II revision.[17] As did the lower court in the *General Motors* case, the district court here emphasized the important role the state plays in defining authorized emissions. The court also noted the logical corollary of that role, that is—the "state of regulatory limbo" EPA creates for companies operating in compliance with revised SIPs.

> Due to its inaction on the proposed [SIP II] revision, the EPA may not bring an enforcement action against Alcan under the existing [SIP] *since Alcan has been operating in reliance upon assurances by [Jefferson County] that its emissions are acceptable and in compliance with the proposed [SIP II] revision.* The EPA may not seek to enforce the standards of the proposed [SIP II] revision since it failed to take any action on the proposal. *This regulatory quandry is of EPA's own making.*

694 F. Supp. at 1284 (emphasis added).

[16] The Sixth Circuit erroneously stated that EPA disapproved the revision on October 18, 1988. *United States* v. *Alcan Foil Products, Division of Alcan Aluminum Corp.*, No. 88-6300, slip op. at 5 (Nov. 21, 1989). EPA only *proposed* to disapprove the revision on that date. 53 Fed. Reg. 40745. It did not take *final* action until five months later. 54 Fed. Reg. 10982.

[17] The district court did not mention EPA's failure to act on the March 3, 1982, revision to SIP I. Nor did EPA refer to the SIP I revision in its statement of facts.

2. *The Sixth Circuit Decision*

The U.S. Court of Appeals for the Sixth Circuit affirmed the application of the four-month rule to SIP revisions,[18] but disagreed with the lower court on the consequences of EPA delay. *United States* v. *Alcan Foil Products, Division of Alcan Aluminum Corp.*, No. 88-6300, slip op. (6th Cir. Nov. 21, 1989). Like the First Circuit in *General Motors*, the Sixth Circuit found dismissal a "drastic" remedy for EPA's failure to act within four months.[19] Slip op. at 14. The Sixth Circuit disagreed with the First Circuit, however, on the effectiveness of mandamus actions under § 304(a), citing Jefferson County's failed attempt to compel EPA action on the SIP I revision.[20] It proposed instead that trial courts in enforcement actions weigh the reasonableness of EPA's delay against the prejudice suffered by the company by means of a balancing test that places the burden of proof

[18] The Sixth Circuit characterized as "arguably dicta" contradictory language in *United States* v. *National Steel Corp.*, 767 F.2d 1176 (6th Cir. 1985) which suggested that the four-month rule did not apply to SIP revisions. The courts of appeals are now in complete agreement regarding the four-month deadline for EPA review of SIP revisions. *See infra* note 25.

[19] Citing *Brock* v. *Pierce County*, 476 U.S. 253, 260 (1986), the Sixth Circuit also expressed concern about treating statutory time periods as jurisdictional, "especially when important public rights are at stake." Slip op. at 13. This concern ignores the fact that the states are not only responsible for assuring attainment of air quality goals, but also are better able to determine the best interests of their citizens.

[20] *See supra* note 12.

on EPA to justify its failure to comply with the statutory four-month period.

SUMMARY OF ARGUMENT

Companies subject to SIP requirements need to know on a timely basis whether a revision proposed by the state will be approved or denied. In the *General Motors* case below, EPA took nearly three years to deny the SIP revision proposed by Massachusetts. By that time, EPA had already filed an appellate brief in an enforcement action brought against the company for noncompliance with the original SIP.

In the *Alcan* case—which involves three proposed revisions to Kentucky's clean air program—EPA never even acted on the first revision that was submitted for review nearly ten years ago. In an effort to eliminate the uncertainty created by EPA's failure to act on that revision, the state submitted a second revision specifically addressing Alcan's problem. EPA took more than three years to review the second revision—finally rejecting it only after the trial court dismissed an enforcement action against Alcan for failing to comply with the original SIP. As grounds for the rejection, EPA cited a new policy that did not exist at the time of submission.

As a remedy for EPA's protracted delay in reviewing SIP revisions, the First Circuit has suggested that companies either file a mandamus action under § 304(a)(2) of the Act[21] to compel EPA review or move the trial court in an enforcement action to reduce penalties for prejudicial delay. Alcan's experience, however, proves both options to be an ineffective panacea for EPA's failure to act.

In the *Alcan* case, a mandamus action filed by the local pollution control district failed to compel EPA to review the SIP I revision. It is doubtful that a different result

[21] 42 U.S.C. § 7604(a)(2).

would have obtained if a similar action had been filed by Alcan instead. Moreover, with civil penalties of $25,000 per day, it is economically impractical for *any* company to risk filing time-consuming mandamus actions against EPA, and thereby subject itself to potentially enormous fines as well as unnecessary litigation expenses. This is especially true for companies that can not afford to operate their facilities without the benefit of the state-approved SIP revision. Under those circumstances—when a company must decide between shutting down now or being forced out of business later—even a reduction of penalties in an ensuing enforcement action (assuming the trial court chooses to exercise such discretionary authority) fails to adequately protect it from EPA delay.

Penalty reductions are equally ineffective in discouraging EPA from usurping the primary role of the states to decide how best to achieve the goals of the Clean Air Act. The only way to safeguard the rightful role of the states—while adequately protecting corporate interests—is to prohibit EPA from bringing an enforcement action under the old SIP until it acts on the SIP revision.

ARGUMENT

I. EPA ENFORCEMENT AGAINST COMPANIES IN COMPLIANCE WITH STATE-APPROVED SIP REVISIONS DISTORTS THE STATUTORY SCHEME OF THE CLEAN AIR ACT.

Both the First Circuit in the *General Motors* case and the Sixth Circuit in *Alcan* premise their rejection of the *American Cyanamid* rule on the harm the public would suffer by prohibiting EPA from enforcing the original SIP until it denies the SIP revision.[22] This concern about public harm ignores the rightful role of the states to assure attainment of air quality goals. It also wrongly

[22] *See General Motors*, App. at 14a; *Alcan*, slip op. at 14.

disregards the fact that SIP revisions are promulgated by the states, and not by the companies that comply with them. Allowing EPA to file enforcement actions against these companies before acting on the SIP revision perpetuates a state of regulatory limbo that violates the spirit and intent of the Clean Air Act.

A. The Clean Air Act Vests The States With The Right To Make Source Emission Selections.

Section 107(a) of the Clean Air Act expressly provides that "[e]ach state shall have the *primary* responsibility for assuring air quality within the entire geographic area comprising such state." 42 U.S.C. § 7407(a) (emphasis added). This Court acknowledged the state's primary role in *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, where it also described EPA's conversely limited role in reviewing state choices for assuring air quality.

> The Agency is plainly charged by the Act with the responsibility for setting national ambient air standards. Just as plainly, however, it is relegated by the Act to a *secondary role* in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met . . . The Act gives the Agency no authority to question the wisdom of a State's choice of emission limitations if they are part of a plan which satisfies the standards of Section 110(a)(2) . . . So long as the ultimate effect of a State's choice of emission limitations is in compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission standards it deems best suited to its particular situation.

421 U.S. at 79 (1975) (emphasis added).

Section 110(a)(3)(A) of the Act, on the other hand, limits EPA to an essentially supervisory role—not unlike the role corporate management plays when determining

compliance with company policy. Specifically, it states that "[t]he Administrator shall approve a revision . . . if he determines that it meets the requirements of paragraph 2 and has been adopted by the State after reasonable notice and public hearings." 42 U.S.C. § 7410(a)(3)(A). Section 110(a)(2) contains a checklist of eleven criteria all SIPs must meet. 42 U.S.C. § 7410(a)(2).

In the *Alcan* case, only two of those criteria arguably related to EPA's review of the SIP II revision.[23] Nevertheless, it took EPA more than three years to disapprove the revision. Moreover, none of legal bases for disapproving the SIP II revision existed at the time of submission. Nor were these bases even promulgated until well after the end of EPA's four-month review period.[24]

Alcan's experience evidences calculated conduct on the part of EPA to intentionally deprive the states of their statutory prerogatives to make their own source emission choices. Because the SIP II revision fully complied with current regulatory requirements, EPA was legally obligated to approve it on July 3, 1986—four months after submission, just as it had been legally obligated to approve the SIP I revision in 1982. Under both the SIP I and SIP II revisions, the state had decided how it wished to implement its regulatory obligations under the Act. Moreover, these choices were fully consistent with

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[23] EPA had to determine whether the SIP II revision contained (1) emission limitations, schedules and timetable for compliance and (2) appropriate devices for monitoring, compiling and analyzing ambient air quality data. *See* 42 U.S.C. § 7410(a)(2)(B) and (C).

[24] EPA did not promulgate two of the grounds for denial (the 24-hour averaging requirement and the requirement for using surplus reductions as credits) until December 4, 1986—nine months after the SIP II revision was submitted and five months after the statutory review period had expired. 51 Fed. Reg. 43814; 43831. EPA did not issue the third requirement (for 20% reduction in overall emissions) until May 26, 1988. This was more than two years after submission.

applicable law at the time. Yet EPA—apparently deciding that it did not like the state's choices or the current law (or both)—simply refused to act. EPA's conduct makes a mockery of the Clean Air Act's statutory scheme and should not be condoned.

B. EPA Usurps The Rightful Role Of The States Every Time It Delays Review Beyond The Four-Month Period.

Every court of appeals to have ruled on the issue has held that the Clean Air Act imposes a four-month deadline on EPA to review SIP revisions. *See Council of Commuter Organizations* v. *Gorsuch*, 683 F.2d. 648, 651-52 n.2 (2d Cir. 1982); *Council of Commuter Organizations* v. *Thomas*, 799 F.2d 879, 888 (2d Cir. 1986); *Dusquense Light Co.* v. *EPA*, 698 F.2d 456 (D.C. Cir. 1983); *American Cyanamid Co.* v. *EPA*, 810 F.2d 493 (5th Cir. 1987); *United States* v. *General Motors Corp.*, 876 F.2d 1060 (1st Cir. 1989); *United States* v. *Alcan Foil Products, Division of Alcan Aluminum Corporation*, No. 88-6300, (6th Cir. Nov. 21, 1989)."[25] Each of these courts has acknowledged, as did the government in the

[25] In *Alcan*, the Sixth Circuit revisited the language in *United States* v. *National Steel Corp.*, 767 F.2d 1176, 1182-83 n. 1 (6th Cir. 1985), which the government cites as contrary authority. In that case, the Sixth Circuit had stated:

> National claims that section 110(a)(2) of the Clean Air Act . . . requires the EPA to approve or disapprove SIP revisions with four months of their submittal by the state. Section 110(a)(2) requires action within four months for general state plans submitted under section 110(a)(1), not for revisions to state plans governed by section 110(a)(3)(A)."

Upon reexamination, the Sixth Circuit found the four-month rule to be incorporated "at least by implication" in § 110(a)(3)(A) of the Act. Slip op. at 7. In support of that reading of the statute, the Sixth Circuit also cited § 110(g)(1), which was added to the Act in 1977 but not cited in *National Steel*. Slip op. at 8.

Alcan case,[26] that EPA does not have an unlimited time to act. As stated by the Sixth Circuit in *Alcan*, "[g]iven the primary role of the states in implementing air quality standards, it is difficult to conclude that EPA is not required to act with dispatch on a revision proposed by a state." Slip op. at 9. The First Circuit in *General Motors* even more explicitly expressed its concern about EPA's unbridled ability to interfere with the rightful role of the states.

> Congress clearly was concerned with preserving the state's ability to tailor SIPs to local needs and conditions and, just as plainly, did not care what controls states chose, so long as they were designed to reduce emissions to nationally acceptable levels. The states' freedom to make such choices obviously is curtailed to the extent that SIPs must be consistent with federal standards. It seems unlikely, however, that Congress also intended for the states' legitimate policy choices to be held hostage to the EPA's schedule.

General Motors, App. 12a.

Under the Clean Air Act, the states are free to alter or fine tune their air quality program as often as necessary to accommodate changing economic, technological or air quality conditions. Only by upholding the four-month deadline for reviewing SIP revisions can this Court remove the threat of protracted delay, and thus prevent EPA from depriving the states of their legitimate statutory role.

II. THIS COURT SHOULD PROTECT COMPANIES FROM THE REGULATORY LIMBO EPA'S DELAY CREATES BY PROHIBITING ENFORCEMENT UNTIL EPA ACTS ON THE SIP REVISION.

The protracted EPA delays experienced by General Motors and Alcan are not aberrations. According to a

[26] *See* Government's brief at 22, "Finally, the absence of a four-month deadline does not allow the EPA to postpone a decision indefinitely."

recent Inspector General report, it takes EPA an average of 30 months to review a proposed SIP revision—more than two years longer than the review period required by statute.[27]

As a result of EPA delay, companies that comply with the new rule changes approved by their state face the threat of federal enforcement actions for noncompliance with the original SIP. With statutory civil penalties of $25,000 per day of violation,[28] the longer EPA waits to review a SIP revision, the greater the amount of penalties recoverable—and, consequently, the greater the incentive for EPA to deny the revision and enforce the original SIP. Forcing companies to linger in this kind of regulatory limbo not only undermines the Act, but also is fundamentally unfair to those who have relied on state assurances that their emissions are acceptable and in compliance with state-authorized revisions.

A. The Remedies Proposed By The First Circuit Are An Ineffective Panacea For EPA Delay.

As a remedy for EPA failure to meet the four-month deadline, the First Circuit has suggested that companies either file a mandamus action under § 304(a)(2) of the Act[29] to compel EPA review or move the trial court in an enforcement action to reduce penalties for prejudicial delay. *General Motors* at App. 14a-16a. Alcan's experience, however, proves both options to be an ineffective panacea for EPA's failure to act.

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[27] Report of Audit, *Review of EPA's Process for Approving/Disapproving State Implementation Plans and Revisions*, Office of the Inspector General, U.S. Environmental Protection Agency (March 1989).

[28] 42 U.S.C. § 7413(c)(1).

[29] 42 U.S.C. § 7604(a)(2).

1. *Mandamus Does Not Work.*

The Sixth Circuit expressly rejected the mandamus option as "not very effective" in the *Alcan* case. Slip op. at 14. There, the local pollution control district filed suit under § 304(a)(2) to compel agency action four years after the SIP I revision was submitted for EPA review. *See Air Pollution Control District of Jefferson County, Kentucky* v. *EPA*, No. C-86-0519-L-B (W.D. Ky. 1986). This case has been pending for four years, with no action in sight.[30] It is highly unlikely that a different result would have obtained if the mandamus action been filed by Alcan instead of Jefferson County.

In addition to its proven ineffectiveness, a mandamus suit to compel EPA action is also highly impractical. Ironically, the time it takes to compel agency action (and to defend against such a suit) may cause even further delays. At the risk of incurring civil penalties of up to $25,000 per day of violation, companies can ill afford to let the meter run by invoking such time-consuming proceedings. This is especially true for marginally profitable, independent economic units like Alcan's Foil Products Division.

Even if the mandamus suit is successful and the SIP revision is approved, the company still will have wasted time and unnecessary litigation expenses in compelling action which the statute already requires to be performed within four months. If the mandamus action results in EPA's denial of the SIP revision, on the other hand, it

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[30] The Sixth Circuit apparently was referring to the SIP II revision when it erroneously stated that "a final ruling on the proposed revision came well over two years the section 304(a) suit was filed." Slip op. at 12. Regrettably for Alcan, EPA has yet to act on the SIP I revision, nearly a decade later. The agency did act on the SIP II revision, albeit more than three years late. What compelled EPA action there, however, was not a mandamus suit filed by the local authority, but rather the dismissal of its enforcement action against Alcan for noncompliance with SIP I.

would have served only to increase the penalty EPA could assess against the company in an ensuing enforcement action.

2. *Penalty Reductions Do Not Adequately Protect Companies From EPA Delay.*

The second remedy proposed by the First Circuit—penalty reductions in enforcement actions filed under § 113(b) [31] of the Act—also fails to adequately protect companies that have operated in reliance on state-authorized SIP revisions. Allowing EPA to enforce original SIPs prior to acting on SIP revisions turns Clean Air Act regulation into a game of chance. It forces companies, like Alcan, that cannot afford to operate without the benefit of the SIP revision to choose between voluntarily shutting down now—even though the state has authorized continued operation—or being shut down by EPA by heavy fines later.[32] Contrary to the First Circuit's suggestion, the possibility that penalties may be reduced in an ensuing enforcement action does little to remove the "Scylla and Charybdis choice" [33] companies face whenever EPA takes longer than four months to review a SIP revision. Penalty reductions do even less to compensate the states whose responsibilities for balancing national priorities with local interests have been totally usurped by the enforcement action. Companies that have complied with SIP revisions—and the states that have promulgated them

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[31] Section 113(b) of the Act requires that district courts "shall take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation." 42 U.S.C. § 7413(b).

[32] As noted by the district court below, even if heavy fines do not force companies into bankruptcy, "that would be cold comfort to . . . workers who might be laid off while a new plant was being built or because the plant was moved out of state." *General Motors*, SA-7.

[33] *General Motors* at SA-6.

—still remain in the regulatory limbo created by EPA's delay.

Aside from the inequities of allowing EPA to enforce prior to acting on SIP revisions, there is also a practical reason why reducing penalties fails to adequately safeguard companies from EPA delay. Penalty reductions for prejudicial delay are not included among the specifically enumerated considerations mandated by the statute. As such, they are entirely at the discretion of the trial court and, therefore, provide no guarantee of protection from protracted EPA delay.

Even the First Circuit characterizes the reasonableness of EPA's delay and the prejudice suffered by the company as "among these 'other factors' the court *may* consider." *General Motors*, App. at 15a (emphasis added). The discretionary nature of this remedy is emphasized in the court's description of how it would work.

> If, for example a trial court finds that the review process should have taken ten months rather than two years, it *may decline* to award penalties for the fourteen months of unwarranted delay. Accordingly, if on remand in this case, the district court finds that GM was prejudiced by the Agency's lengthy review and the delay was not justified or that some portion of the delay was not justified, it *may reduce* the penalties in a manner it sees fit.

Id. (emphasis added).[34] Assuming the trial court ever exercises its discretionary authority to award them, reduced penalties are of slight consolation to marginally economic companies which cannot afford to pay them. For example, in the Alcan case, it is unlikely that the company could absorb even the twelve-month reduction

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[34] *Accord Alcan*, slip op. at 14 ("The district court clearly has *discretion* to determine what penalties should be imposed for noncompliance.") (emphasis added).

in fines the Sixth Circuit suggested the trial court consider on remand.[35]

B. Barring Enforcement Until EPA Acts On The SIP Revision Is The Only Equitable Remedy For EPA Delay.

The only effective, practical and fair remedy for EPA's failure to comply with the four-month rule is to invoke the *American Cyanamid* rule and prohibit EPA from enforcing the original SIP until it acts on the SIP revision. Of all the other circuit court suggestions, the *Cyanamid* rule provides the most equitable remedy for all parties affected by a SIP revision.

By requiring EPA to reject a SIP revision before it enforces the original SIP, the *Cyanamid* rule provides EPA with an incentive to abide by the four-month rule. The Fifth and First Circuits both found the lack of such an incentive critical to their rejection of the deferred penalty approach of the D.C. Circuit in *Dusquense Light Co.* v. *EPA*, 698 F.2d 456 (D.C. Cir. 1983). Both courts feared that the *Dusquense* approach of holding penalties in abeyance would encourage EPA to reject revisions it should have approved since the longer EPA delayed review, the greater the penalties it could collect in an enforcement proceeding. According to the Fifth Circuit, "EPA loses nothing by its contumaciousness" under the *Dusquense* approach. *American Cyanamid*, 810 F.2d at 499.

Nor will the threat of reduced penalties, as suggested by the First and Sixth Circuits, sufficiently modify EPA's

[35] Instead of assessing penalties from January 19, 1985, the date Alcan bought the laminating facility, the Sixth Circuit suggested that they be calculated from December 4, 1986, the effective date of EPA's new emissions trading policy upon which the SIP II revision was ultimately denied. The Sixth Circuit based this suggestion on the assumption that EPA would not be able to satisfy its burden of proving reasonable delay. *Alcan*, slip op. at 15.

contumacious behavior in refusing to honor the four-month rule. As noted by the Fifth Circuit in *American Cyanamid*, "EPA's statutory noncompliance affects not only its right to adjudicate tentatively the amount of [penalties] but also, and more important to this case, its authority to commence [enforcement] proceedings." 810 at 493. So long as EPA retains the power to enforce original SIP's prior to acting on SIP revisions, it will continue to exercise "pocket vetoes" of state air quality decisions.

EPA's deliberate distortion of the statutory scheme was of particular concern to the *Cyanamid* court and a "critical element" [36] in its adoption of the enforcement bar:

> Where, as here, the state has proposed a revision to its SIP which clearly authorizes local businesses to act in accordance with it without running afoul of the Clean Air Act, the interest of the state itself is deeply involved in the required four month approval or disapproval of the proposed revision. It distorts the statutory scheme to place virtually full emphasis on the business entity involved as the charged 'polluter.' The emphasis of the statute, rather, is upon the important role which the state plays in defining authorized emissions . . . The issue then is not so much pollution by American Cyanamid but the default of the EPA in carrying out the congressional intent to work in close cooperation with the states in implementing standards and enforcing the Clean Air Act.

American Cyanamid, 810 F.2d at 500.

Of all the remedies for EPA delay suggested by the courts of appeals, the *American Cyanamid* rule alone recognizes the inequities of allowing EPA to bring enforcement actions against companies that are in compliance with state-authorized SIP revisions. Until EPA rejects

[36] *American Cyanamid*, 810 F.2d at 499.

the SIP revision, a company should be allowed to rely on the state's determination of compliance with the Act, without the threat of federal enforcement. Only then will companies be adequately protected from EPA's recurring efforts to deprive the states of their rightful role under the Clean Air Act.

CONCLUSION

For the reasons stated above, the Chamber respectfully urges this Court to uphold the four-month rule and prohibit EPA from enforcing the original SIP until it denies the SIP revision.

Respectfully submitted,

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